

M22PFIS1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

20 Cr. 160 (MKV)

6 SETH FISHMAN,

7 Defendant.

Trial

8 -----x
9 New York, N.Y.
10 February 2, 2022
11 10:25 a.m.

12 Before:

13 HON. MARY KAY VYSKOCIL,

14 District Judge
15 -and a Jury-

16 APPEARANCES

17 DAMIAN WILLIAMS

18 United States Attorney for the
19 Southern District of New York

BY: ANDREW C. ADAMS
SARAH MORTAZAVI
ANDEN F. CHOW
Assistant United States Attorneys

SERCARZ & RIOPELLE, LLP
Attorneys for Defendant Fishman

BY: MAURICE H. SERCARZ
-and-

LAW OFFICE OF MARC FERNICH
BY: MARC A. FERNICH

ALSO PRESENT: KARLINE JUNG, Paralegal Specialist

M22PFIS1

(Trial resumed; jury not present)

THE COURT: Good morning, everyone. All right. So you can be seated. Ms. Dempsey, I guess you should take appearances, please.

THE DEPUTY CLERK: Yes, Judge.

Counsel, starting with the government, please state your name for the record.

MS. MORTAZAVI: Good morning, your Honor. For the government, Sarah Mortazavi, Andrew Adams and Anden Chow.

THE COURT: Good morning.

MR. SERCARZ: Good morning, your Honor. For the defendant Fishman, Marc Fernich and Maurice Sercarz.

MR. FERNICH: Good morning, your Honor.

THE COURT: All right, good morning.

So we called you just to let you know that we had two relatively minor notes, but we've now just received a third note. So the first note, which we'll mark as Exhibit 1, 8:50 this morning: "Ellen Barry, foreperson." 8:50 a.m., 2-2-22. All right? We asked the jurors to let us know who the foreperson was.

9:30 a.m. on today's date we received a note: "11 juror missing." But we have now confirmed that juror No. 11 is, in fact, here. We have now -- and that will be marked as Court Exhibit 2.

We now have a third note, which we will mark as

M22PFIS1

1 Exhibit 3, and it reads as follows: On pages 19 and 20, we
2 need a clarification. Do we need to be unanimous about which
3 object of each count we should consider, or is it enough that
4 we all agree that one of the objects exists?" Signed by the
5 foreperson, Ellen Barry, 2-2-22, 10:20 a.m.

6 All right. You all have your copies of the charges?

7 MR. ADAMS: I do, your Honor. Would you mind either
8 reading that one more time, or if we can read it with you, that
9 would be useful. I didn't quite catch the phrasing on the
10 first --

11 THE COURT: What do you mean, read it with me?

12 MR. ADAMS: Have us step up to sidebar, if that's
13 easier.

14 THE COURT: I'm happy to read it again, and then we
15 can come to sidebar. All right?

16 Just to read it again: "On pages 19 and 20, we need a
17 clarification. Do we need to be unanimous about which object
18 of each count we should consider, or is it enough that we all
19 agree that one of the objects exists?"

20 I will hand the note to Ms. Dempsey, and she will pass
21 it to you, Mr. Adams, and then if you would pass it to
22 Mr. Sercarz after you've looked at it.

23 MR. ADAMS: Thank you, your Honor.

24 MR. FERNICH: Judge, your Honor, your charge covered
25 this pretty extensively on page 20, that first full paragraph.

M22PFIS1

1 THE COURT: All right. Mr. Fernich, just give
2 Mr. Adams a minute to look at it --

3 MR. FERNICH: Sure, sure.

4 THE COURT: -- and then he'll let you look at it.

5 MR. FERNICH: Sure.

6 (Pause)

7 MR. ADAMS: Thank you, Judge.

8 THE COURT: All right. Do you each need a moment?
9 Why don't I let each team have a moment to confer.

10 MR. FERNICH: Yeah, I think on page 20 --

11 THE COURT: Mr. Fernich, I just said let's let each
12 team have a moment to confer. The government is talking to
13 each other.

14 MR. FERNICH: Sure, sure. No worries.

15 (Pause)

16 MS. MORTAZAVI: So, your Honor, I think both sides
17 have agreed on a proposal.

18 THE COURT: Okay.

19 MS. MORTAZAVI: Would you like me to write it down and
20 pass it up, or read it out loud?

21 THE COURT: Yes, if you write it down and pass it up,
22 that would be very helpful.

23 MS. MORTAZAVI: It may take me a minute to make it
24 legible.

25 THE COURT: No problem.

M22PFIS1

1 (Pause)

2 MS. MORTAZAVI: So, your Honor, I'll hand to
3 Ms. Dempsey the note.

4 THE COURT: Thank you. This is the proposed response
5 you're saying?

6 MS. MORTAZAVI: That's correct, your Honor. The
7 proposed response that the parties agreed upon, and I think
8 given the straightforward nature of the question, it can likely
9 be passed back to the jury without calling them up.

10 THE COURT: I see. All right. All you're doing,
11 though, is repeating the exact language that's in here.

12 MS. MORTAZAVI: That's right. I think it's just a
13 reorganization of the same language.

14 THE COURT: I think the question the jurors are
15 asking, and I can't disagree that there's some ambiguity here,
16 they're asking do they just have to be unanimous that one of
17 the objects of the conspiracy exists, or do they have to be in
18 agreement about which one of the objects? That's how I
19 understand their question.

20 MS. MORTAZAVI: Well, we could clarify. The
21 instruction ends with "you must be unanimous as to that
22 objective." We could clarify "you must be unanimous as to the
23 objective."

24 THE COURT: Where does it say "that"? It says "the;"
25 it doesn't say "that."

M22PFIS1

1 MS. MORTAZAVI: Right.

2 THE COURT: Oh, you wrote "that."

3 MS. MORTAZAVI: Correct. I was referring to the note
4 that I passed up as our proposed response.

5 THE COURT: Anything from the defendant?

6 MR. SERCARZ: We are in accord with Ms. Mortazavi.

7 THE COURT: All right. I will return this
8 instruction, then. We'll have it typed up and sent back to
9 them.

10 MR. ADAMS: Okay, your Honor.

11 THE COURT: All right. Thank you. We'll let you
12 know. You're all on standby. We'll let you know if we receive
13 any further notes.

14 MR. SERCARZ: If I may? Would the Court be prepared
15 to sign an order so that I can bring my laptop past the
16 security guard and get it up into the building?

17 THE COURT: Yes.

18 MR. SERCARZ: Mr. Fernich and I have been working in
19 the building.

20 THE COURT: Yes.

21 MR. SERCARZ: Thank you.

22 THE COURT: Everyone else submitted them, including
23 your client.

24 MR. SERCARZ: I'm sorry, your Honor, I couldn't hear
25 you.

M22PFIS2

1 THE COURT: I said everyone else submitted them, and I
2 said that at the start of the trial, and I said "including your
3 client."

4 MR. SERCARZ: Thank you. I know, and the printer.
5 I'm aware of it. I'm the latecomer, but I never had my name
6 placed on an order.

7 THE COURT: Yes. All right. If you submit it, we'll
8 take care of that. That would be fine.

9 All right. Thank you, all.

10 MS. MORTAZAVI: Thank you, your Honor.

11 (Recess pending verdict)

12 (In open court; jury not present)

13 THE COURT: All right. Please be seated, everyone.
14 All right. We are back on the record. We do have word from
15 the CSO that we have a verdict.

16 So, Ms. Dempsey, would you let them know that they can
17 bring the jury up?

18 And the record should reflect that all counsel are in
19 attendance, please.

20 (Pause)

21 (Jury present)

22 THE COURT: All right. Please be seated, everyone.
23 Good morning, ladies and gentlemen. The Court
24 understands the jury has a verdict; is that correct,
25 Ms. Foreperson?

M22PFIS2

1 THE FOREPERSON: Yes, correct.

2 THE COURT: All right. Would you, Madam Foreperson,
3 hand the verdict to my courtroom deputy, Ms. Dempsey.

4 (Pause)

5 All right. Ladies and gentlemen of the jury, I'm
6 going to hand to Ms. Dempsey and Ms. Dempsey is going to hand
7 the verdict back to Ms. Barry.

8 Ladies and gentlemen of the jury, please listen
9 carefully.

10 Madam Forewoman, would you please read the verdict,
11 the questions and the answers, please?

12 THE FOREPERSON: One, with respect to Count One --

13 THE COURT: Hold on. The mic is not turned on. I'm
14 sorry.

15 THE FOREPERSON: With respect to Count One, conspiracy
16 to commit adulteration and misbranding, how do you find the
17 defendant, Seth Fishman? Guilty.

18 If guilty on Count One, do you find that he had intent
19 to defraud or mislead? Yes.

20 With respect to Count Two, conspiracy to commit
21 adulteration and misbranding, how do you find the defendant,
22 Seth Fishman? Guilty.

23 If guilty on Count Two, do you find that he had intent
24 to defraud or mislead? Yes.

25 If guilty on Count Two, do you find that he committed

M22PFIS2

1 the offense in part after he was released on bail on or about
2 October 28th, 2019? Yes.

3 THE COURT: Thank you.

4 Ms. Dempsey, would you retrieve the verdict.

5 All right. Ladies and gentlemen, having listened to
6 the verdict as it was read aloud, I am going to ask my
7 courtroom deputy to poll the jury, which means she will call on
8 each of you in turn and ask you to confirm whether this is your
9 verdict.

10 THE DEPUTY CLERK: Juror No. 2, is this your verdict?

11 DR. PEREZ: Yes.

12 THE DEPUTY CLERK: Juror No. 3, is this your verdict?

13 JUROR: Yes.

14 THE DEPUTY CLERK: Juror No. 4, is this your verdict?

15 JUROR: Yes.

16 THE DEPUTY CLERK: Juror No. 5, is this your verdict?

17 JUROR: Yes.

18 THE DEPUTY CLERK: Juror No. 6, is this your verdict?

19 JUROR: Yes.

20 THE DEPUTY CLERK: Juror No. 7, is this your verdict?

21 JUROR: Yes.

22 THE DEPUTY CLERK: Juror No. 8, is this your verdict?

23 JUROR: Yes, it is.

24 THE DEPUTY CLERK: Juror No. 9, is this your verdict?

25 JUROR: Yes.

M22PFIS2

1 THE DEPUTY CLERK: Juror No. 10, is this your verdict?

2 JUROR: Yes, it is.

3 THE DEPUTY CLERK: Juror No. 11, is this your verdict?

4 JUROR: Yes.

5 THE DEPUTY CLERK: Juror No. 12, is this your verdict?

6 JUROR: Yes.

7 THE COURT: And for the record, the foreperson,
8 Ms. Barry?

9 THE DEPUTY CLERK: I apologize. Juror No. 1, is this
10 your verdict?

11 JUROR: Yes.

12 THE COURT: All right.

13 THE DEPUTY CLERK: The jury is polled.

14 THE COURT: Counsel, is there any reason why the jury
15 may not be dismissed at this time?

16 MR. SERCARZ: No, your Honor.

17 MS. MORTAZAVI: No, your Honor.

18 THE COURT: Mr. Sercarz?

19 MR. SERCARZ: No, your Honor.

20 THE COURT: All right. Ladies and gentlemen, you've
21 reached the conclusion of your jury service, and I thank you
22 very, very much for your efforts. In a short, few moments you
23 will be dismissed and discharged from jury service.

24 I want to tell you, at this point, you are now free to
25 discuss the case with anybody whom you may wish, but it is your

M22PFIS2

1 individual decision whether you wish to speak to anybody about
2 that case, and that includes counsel to the parties and that
3 includes the press. You are free to speak to them, if you
4 wish, but you are equally free to say you do not wish to speak
5 to anybody.

6 I would ask if you do choose to speak to anybody,
7 please confine whatever comments you make to whatever your own
8 views are, and do not discuss with or disclose the
9 deliberations that you had among yourselves during the
10 deliberation process. Please treat the statements that might
11 have been made by any of your fellow jurors as confidential,
12 and let each of those jurors decide for him or herself whether
13 they wish to speak to anybody about that. All right?

14 At this point, our court security officer will escort
15 you back to the jury room. If you could please just remain
16 there for a few short moments, and then we'll let you know that
17 we're discharging you. We will also try to arrange for
18 additional security officers so that you don't have to go in
19 stages the way we had to bring you back and forth. All right?

20 So thank you all very much, and you are dismissed to
21 the jury room for a few moments. Thank you.

22 (Jury discharged)

23 All right. Please be seated, everyone.

24 All right. Just a couple of housekeeping things for
25 the record. We marked the response that we gave back to the

M22PFIS2

1 jurors, the typed-up version of it, as Exhibit 4.

2 Ms. Barry just handed us, on her way out, a note which
3 says: "We've reached a verdict" but she told that to the court
4 security officer, but nevertheless, we'll mark this as Court
5 Exhibit 5.

6 And the verdict, obviously, will be part of the
7 record, and I'm handing them to Ms. Dempsey now.

8 Sentencing will be set for May 5, in order to allow
9 time for the presentence report. Mr. Sercarz, I assume that
10 you wish -- you or Mr. Fernich or both of you, wish to be
11 present at any interview by probation?

12 MR. SERCARZ: Yes, your Honor.

13 THE COURT: All right. And, obviously, you will need
14 to let us know what the situation is, if there needs to be
15 adjustments in the schedule given the circumstances. All
16 right?

17 MR. SERCARZ: Yes, your Honor.

18 THE COURT: The rules with regard to the date for
19 everybody's objections to sentencing reports and each side's
20 sentencing submissions, we'll e-mail you, but they're standard.
21 Okay?

22 Is there anything else for the record?

23 MS. MORTAZAVI: Yes, your Honor. The government moves
24 to have the defendant detained upon execution of the bench
25 warrant. Now, our intention, given some ambiguity with the

M22PFIS2

1 situation that I won't elaborate on, the government does not
2 intend to execute the bench warrant instantly but at the point
3 it is executed, we would, and we believe it's appropriate, to
4 have the defendant detained in light of today's verdict.

5 THE COURT: Mr. Sercarz?

6 MR. SERCARZ: Your Honor, may I request that in order
7 to go into detail on this, that we proceed on sealed record?

8 THE COURT: We can discuss this in the robing room,
9 yes.

10 MR. SERCARZ: Thank you, your Honor.

11 THE COURT: In light of the circumstances, yes. What
12 time is it now? I'd like to see everyone in the robing room,
13 then, at 12:30, if we can do that.

14 MS. MORTAZAVI: Yes, your Honor.

15 THE COURT: I just need a short amount of time to
16 attend to something.

17 MR. FERNICH: Judge, excuse me.

18 THE COURT: Yes?

19 MR. FERNICH: I just have one application to place on
20 the record.

21 THE COURT: Yes.

22 MR. FERNICH: At this time, we're moving under rule
23 29(c) to dismiss Count One of the indictment as multiplicatas.
24 Count Two, or more precisely, to merge it into Count Two. I'm
25 happy to do that on paper, if your Honor would like, and in

M22PFIS2

1 light of the circumstances just alluded to, I guess it's
2 normally due 14 days, I'd ask to kick it out for 30 days at
3 this point. The scheduling has to be set within the 14-day
4 period; otherwise, it's jurisdictionally gone.

5 THE COURT: You mean if you're going to do it on
6 paper?

7 MR. FERNICH: Yeah, but if you --

8 THE COURT: All right. I'm not going to kick it out
9 now. You can update us. All right? Obviously, if
10 circumstances warrant, you'll let me know, but I'm not going to
11 kick it out now.

12 MR. FERNICH: Okay.

13 THE COURT: And I'll give the government an
14 opportunity to be heard. All right. I'll leave it at that.

15 MR. FERNICH: Okay.

16 THE COURT: All right. Thank you. I'll see everyone
17 in the robing room, then, at 12:30. If you come here, we can
18 accompany you back, all right? Thank you.

19 (Recess)

20 (Pages 1362 through 1376 SEALED by order of the Court)

21 (Adjourned)